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No. 08-703

In The
Supreme Court of the United States

DIANE KING,

Petitioner,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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November 24, 2008

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QUESTIONS PRESENTED

1. May the U.S. Court of Appeals for the Federal Circuit affirm a termination which violates the Civil Service Reform Act of 1978 (CSRA) and the Whistleblowers Protection Act (WPA)?

2. May the U.S. Court of Appeals for the Federal Circuit consider facts not in evidence when sustaining the termination of a whistleblower?

3. May the Merit Systems Protection Board (MSPB) and the U.S. Court of Appeals for the Federal Circuit levy their own charges against a whistleblower? That is, charges not made by the employee's agency.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgement below.

OPINIONS BELOW

[x] For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix A to the petition and is unpublished.

The opinion of the Merit Systems Protection Board appears at Appendix C to the petition and is unpublished.

JURISDICTION

[x] For cases from federal courts.

The date on which the United States Court of Appeals decided my case was May 6, 2008. A timely petition for rehearing was denied by the United States Court of Appeals on the following date: July 24, 2008, and a copy of the order denying rehearing appears at Appendix D.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 2302, Title 5, United States Code provides in pertinent part:

Section 2302.(b)(8) (B).

(Retaliatory action may not be taken because of) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, information which the employee or applicant reasonably believes evidences–

(i) a violation of any law, rule, or regulation or
(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

STATEMENT OF THE CASE

This termination is a prohibited personnel practice. The Civil Service Reform Act of 1978 (CSRA), as amended by the Whistleblowers Protection Act (WPA), prohibits agencies from taking a personnel action with respect to any employee because of any disclosure to the Special Counsel of information which the employee reasonably believes evidences a violation of any law rule or regulation or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety. See U.S.C. Section 2302(b)(8).

The MSPB sustained 2 of 4 charges.

1. Copying and removing confidential medical records of VA patient #0668. Specification: In an e-mail to Robert Ratliff, CAVHCS Director, dated June 28, 2006, you stated that you had copies of relevant lab work sheets and would provide them as soon as possible. On June 29, 2006, you hand delivered two microbiology worksheets to Michael C. Hubbard, CAVHCS Compliance Officer. When asked the name of the patient you replied, "I blocked off the name and last four before I took them home. You can get the patient's name off the lab order number." By copying and removing confidential VA medical records you violated Memorandum No. 136-04-09, which states that VA medical records are the property of VA and will not be removed from VA custody.

#4. Failing to follow the procedure for making entries to patient records. Specification: You made comments in patients #0668's Microbiology Worksheet on February 16, 2005, and March 17, 2005. Patient #0668 died February 15, 2005. On February 16, 2005, you wrote, "No enrichment media on East Campus. Specimen no Rx until after 0800 2/11/05." On March 17, 2005 you wrote, "Dr. Vacchani not informed specimen mishandled". These annotations are in violation of Memorandum No. 136-04-09, which specifically states that "..negative/critical documentation carry medical-legal implications and will not be indulged."

At page 5 of the MSPB decision, the Board states "the appellant admits that she made copies of the microbiology worksheet and she distributed them to third parties, entities outside of the agency such as the

Office of Special Counsel." The Department of Veterans Affairs was aware that I sent this disclosure to the OSC long before they effected the termination.

At page 8 of the transcript, the deciding official (Ratliff) admitted to having reviewed this document prior to effecting the termination. The MSPB also states that I eliminated an entry on a worksheet. But there was no elimination of an entry, nor did the agency charge me with this action. At page 19 of the transcript one finds the following testimony.

> Q. [Petitioner] Is that your contention, that I obscured the notation?
>
> A. [Deciding Official] I'm not contending anything. I just pointed out that it looked different.

The MSPB found that I failed to follow procedures for making entries to patient records. The agency cited Memorandum No. 136-04-09 in its specification as cited above. But the Memo in full pertinent part states the following:

> "Highlighting, underlining, exclamations, question marks, etc. will not be made by a third party to another writer's documentation. Such alterations, defacements and negative/critical documentation carry medico-legal implications and will not be indulged."

In no way do these sentences relate to my factual entries to the worksheet. This was my documentation as I addressed the specimen and no one else's documentation was altered by me.

Further, there is no indication that Micro worksheets are a part of the Consolidated Health Records (CHR) which are the subject of Memorandum 136-04-09. If the memorandum is meant to apply to this documentation, then it is ambiguous and must be construed against the drafting party.

Additional fact errors are as follows. At page 4 of the decision, the Board stated that I informed Dr. Vacchani about the problem with the spinal fluid. This did not occur until the day before the patient died. I had no idea the treating physician had been left in the dark. The Board states that I reported the incident to Ratliff. The patient died 2/16/05. Ratliff testified that he did not arrive in Montgomery until June of 2006. What I reported to Ratliff was my belief that there had been a coverup. The Board states that I forwarded the worksheets to the Joint Commission on Hospital Operations. There is absolutely no evidence that I did so. There is no evidence that I "altered" the worksheets. I redacted information specific to the patient prior to Faxing the sheets to the OSC.

The MSPB cites *Heath v. DOT*, 64 MSPR 638 (1994) in support of this decision. But Health took copies of documents containing co-workers social security numbers to his attorney. I made copies for the sole purpose of disclosure to the OSC and both the DVA and the MSPB knew this. The MSPB takes the position that I "could have and should have recommended to OSC that they subpoena the documents." But the OSC does not have the authority to investigate the disclosures that it receives. In fact, the OSC request that you send "any documents that might support your disclosure."

I cited *Kent v. General Services Administration*, 56 MSPR 536(1993) to the MSPB. Both the MSPB and the court below chose to ignore this case. My disclosure was protected under 5 U.S.C. Section 2302(b)(8). In Kent the MSPB stated–

> "While we agree that substantive agency regulations may have the force and effect of law in other contexts, we find that the statutory language, coupled with the legislative history of the CSRA, subsequently amended by the WPS, evidences a clear legislative intent to limit the term "specifically prohibited by law" in section 2302(b)(8) to statutes and court interpretation of those statutes.
>
> The phrase "specifically prohibited by law" follows other statutory language referring to a "violation of any law, rule, or regulation," thereby indicating that the term "law" was not intended to encompass rules or regulations. The statutory language provides that the only other exception to the protections afforded to these disclosures is where "such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs." Finally, we find that Congress concern with internal agency rules and regulations impeding the disclosure of government wrongdoing, see S.Rep. No. 95-969, 95th Cong., 2d Sess. 12 (1978), reprinted in 1978 US Code & Admin.News 2723,2743, is consistent with this restrictive reading to the statutory language."

They further stated-

"Under the statutory scheme, 2302(b)(8) affords protection from a personnel action taken for the disclosure of such confidential information only where it is made to the Special Counsel, the Inspector General, or a designated agency contact."

The JOINT EXPLANATORY STATEMENT on S. 508 found at 135 Cong.Rec. 4512,5032 states in part:

"There should be no doubt about legislative intent in passing this bill. Individuals should be able to go to the Special Counsel to make a disclosure under section 1213 of title 5, United States Code to complain about a prohibited personnel practice under section 1214, or to allege a violation of another law within the jurisdiction of the Special Counsel under section 1216, without any fear that the information they provide or the investigation their disclosure triggers is used against them."

Of great significance to this case is the LEGISLATIVE HISTORY SENATE REPORT NO. 103-358, 3549, 3559 which references PUBLIC LAW 103-424 (H.R. 2970); October 29, 1994 as follows:

"As indicated above, the plain language of the Whistleblower Protection Act extends to retaliation for "any disclosure", regardless of the setting of the disclosure, the form of the disclosure, or the person to whom the disclosure is made."

These laws and legislative history surely apply to my OSC disclosure.

This DVA action violates the Anti-Gag Statute by spending public funds to curtail my rights under the WPA.

The Anti-Gag Statute has been in effect since 1988. The current statute is found at SEC 820 of the Transportation, Treasury, Housing and Urban Development, the Judiciary, and Independent Agencies Appropriations Act of 2006, which became PL 109-115 on November 30, 2005: SEC. 820. In pertinent part:

> "No funds appropriated in this or any other Act may be used to implement or enforce the agreements in Standard Forms 312 and 4414 of the Government or any other non- disclosure policy, form, or agreement if such policy, form, or agreement does not contain the following provisions: 'These restrictions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by Executive Order No. 12958; section 7211 of title 5, United States Code (governing disclosures to Congress); section 1034 of title 10, United States Code, as amended by the Military Whistleblower Protection Act (governing disclosure to Congress by members of the military); section 2302(b)(8) of title 5, United States Code, as amended by the WPA (governing disclosures of illegality, waste, fraud, abuse or public health or safety threats); the Intelligence Identities Protection Act of 1982 (50 U.S.C. 421 et seq.) (governing

disclosures that could expose confidential Government agents); and the statutes which protect against disclosures that may compromise the national security, including sections 641, 793, 794, 798, and 952 of title 18, United States Code, and section 4(b) of the Subversive Activities Act of 1950 (50 U.S.C. 783 (b)). The definitions, requirements, obligations, rights, sanctions, and liabilities created by said Executive order and listed statutes are incorporated into this agreement and are controlling': Provided, that not withstanding the preceding paragraph, a non- disclosure policy form or agreement that is to be executed by a person connected with the conduct of an intelligence or intelligence-related activity, other than an employee or officer of the United States Government, may contain provisions appropriate to the particular activity for which such document is to be used. Such form or agreement shall, at a minimum, require that the person will not disclose any classified information received in the course of such activity unless specifically authorized to do so by the United States Government. Such non-disclosure forms shall also make it clear that they do not bar disclosures to Congress or to an authorized official of an executive agency or the Department of Justice that are essential to reporting a substantial violation of law".

Petitioner's disclosure is protected by not only the CSRA but also the WPA. The DVA had no right to propose or to take any personnel action based on this disclosure. Further, the DVA continues to spend funds to defend this prohibited personnel practice.

My disclosure to the OSC was THE reason for my termination. At the bottom of pg. 14 of the MSPB decision, the Board states that the deciding official (Ratliff) testified that the taking of medical records and releasing them to a third party was "very serious". But on the next page, the Board finds the deciding official without retaliatory motive because "Ratliff testified that it was fine for employees to make protected disclosures of information to third parties." The Board found me guilty of conduct not included in the charges or the specifications. At page 17 of the Board's decision, the Board states, "the appellant's act of altering the medical record by eliminating the notation of no growth" and then writing her opinion upon in that the sample was mishandled was grievous misconduct."

I wasn't charged with eliminating the notation. Further, see Ratliff s testimony at pages 17 through 9 of the hearing transcript as follows:

MR. BOULWARE: Look under entry K, page 4. Tab K-4-K-page 4.

A. (Witness reviews document.) Okay. Yes, I saw this document.

Q. You saw both of them?

A. Uh-huh.

Q. The spinal fluid and the blood? The autopsy? The next page– you saw both of them?

A. Yeah.

Q. Up at the top of the page we have "Microbiology Worksheet." And you do acknowledge that I redacted both of these pages?

A. When you say "redacted", do you mean you removed something?

Q. I cut out the patient's name and Social.

A. Okay.

Q. You were aware of that?

A. Yes.

Q. I want you to go over to 6, the next page, 6. And we have an un-redacted copy that you all provided.

A. (Witness reviews document.) Yes.

Q. What do you know specifically about how this specimen was handled?

MS. KING: And Judge, an aside: I'm not trying to get into whether or not I was right or I was wrong. I want to show motivation, failure to clearly–

THE COURT: I understand.

Q. What do you know about this specimen, this situation, this patient, from the get-go?

A. Well, what I noticed here is these two documents look different. It looks like the copy that you gave me is different than the copy– 4 is different from

6. It looks like it has been removed – "No growth, 7 days."

Q. Does it look like it was removed or when you look at No. 6, do you note that the annotation made on 2/8 by Susan is a little bit lighter than my handwriting on 2/16 and 3/17? And have you made multiple copies on Xerox machines or copy machines, and have you noted that the more that you make, the lighter the writing can be?

A. No, I haven't made any copies of anything.

Q. Can you tell me what would be the motive in obscuring 2/18, "No growth, 7 days"?

A. I have no idea.

Q. Is that you contention, that I obscured this notation?

A. I'm not contending anything. I just pointed out that it looked different.

As to the 3/17/05 notation, the DVA objected to it based on that fragmentary portion of Memorandum No. 136-04-09 "negative critical documentation carry medico-legal implications and will not be indulged."

The MSPB takes the position that neither the proposing official (Singh) or the deciding official (Ratliff) were motivated to retaliate.

Singh proposed the termination in July. I responded to Ratliff with the material at agency

exhibit 4j. In part– "In 2003 I made a report to the VA's OIG. Dr. Chava's response (Exh A) was full of incorrect and incomplete information. OIG accepted his response and closed the file without further action. Because of this experience I attempted to send my report concerning Mr. Thomas (see Exh. C– you office included this in the evidence file FedEx'd to me on 7/28/06) to the Secretary of Veteran's Affairs via the Office of the Special Counsel.

No later than mid August, Ratliff knew the material went to the OSC as a disclosure. In *Detrich v. Department of the Navy*, Fed. Cir. No. 2007-3100 (2007) the court stated:

> "The WPA does not permit an agency to discipline an employee for disclosing protected information merely because that information has been reported outside the chain of command. An agency cannot require that protected disclosures be made only to supervisory personnel."

During the same time that the Merit Systems Protection Board was considering my case, they were considering *Pedeleose v. Department of Defense*, AT-0752-06-0350-I-1. It is clear that they spent many hours on this case. The Board mentioned Senator Grassley's name 5 times and Senator McCain's 3 times in this decision. I don't grudge any whistleblower a victory. I just don't understand how the Board could make such a clearly erroneous finding in my case and favor Pedeleose with such hoop jumping. Is having Senator Grassley in your corner required before the MSPB will make rational decisions? Because if that is

the case, I am not only out of a home and a job. I am slap out of luck.

REASONS FOR GRANTING THE PETITION

The United States Congress has repeatedly had to strengthen protection for whistleblowers. They were aware of government agency ploys as to "progressive" disciplinary actions directed at whistleblowers and this is why we have the right to appeal even a one day suspension to this Court. Currently, the only avenue of appeal is through the U.S. Court of Appeals for the Federal Circuit. Congress is formulating a law to allow whistleblowers to take appeals to the other federal circuits. If they override the promised presidential veto, then the only precedent available to the other circuits will be the Federal Circuit for Federal Appeals decisions. Congress is changing the law because they are well aware of the Federal Circuit hostility to whistleblowers. In *Waters v. Churchill*, 511 U.S. 661 (1994) Justice Scalia stated:

> "Moreover, the government may certainly choose to give additional protections to its employees beyond what is mandated by the First Amendment, out of respect for the values underlying the First Amendment, values central to our social order as well as our legal system. See e.g., Whistleblower Protection Act of 1989."

Further, "If an employment action is based on what an employee supposedly said, and a reasonable supervisor would recognized that there is a substantial likelihood that what was actually said was protected, the manager must tread with a certain amount of care." "It should, however, be the care that a reasonable

manager would use before making an employment decision-discharge, suspension, reprimand, or whatever else-of the sort involved in the particular case."

The lower court failed to follow the Supreme Court's position that "[I]n cases raising the First Amendment issues we have repeatedly held that an appellant court has an obligation to 'make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression'," quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-286 (1964).

The Merit Systems Protection Board and the U.S. Court of Appeals for the Federal Circuit must not be allowed to ignore the laws of this nation nor their own case law. The United States Supreme Court must exercise its supervisory powers to protect those of us who seek to protect our fellow citizens from the abuse of those who would destroy the careers and lives of responsible federal employees. Please do not deny us justice.

See Legislative History Senate Report No, 103-358. Both Houses joined in stating "There should be no doubt about legislative intent in passing this bill. Individuals should be able to go to the Special Counsel to make a disclosure under section 1213 of title 5, United States Code to complain about a prohibited personnel practice under section 1214, or to allege a violation of another law within the jurisdiction of the Special Counsel under section 1216, without any fear that the information they provide or the investigation their disclosure triggers is used against them."

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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Date: November 24, 2008